



STATE OF MAINE
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AUGUSTA, MAINE
04333-0001

Paul R. LePage

GOVERNOR

August 31, 2018

Secretary Alex M. Azar II
U.S. Department of Health and Human
Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Seema Verma, Administrator
Centers for Medicaid and Medicare Services
7500 Security Boulevard
Baltimore, MD 21244
And via email: seema.verma@cms.hhs.gov

Dear Secretary Azar and Administrator Verma,

I strongly encourage CMS to reject the State Plan Amendment (SPA) that may soon be submitted by the Maine Department of Health and Human Services (DHHS) pursuant to court order. If accepted, the SPA would commit Maine to expanding its Medicaid program to an additional 70,000 to 90,000 individuals. However, *not one dime* of the hundreds of millions of dollars that will be needed to pay for the state's share of the expansion has been appropriated. Until funding is in place, Maine will not be able to satisfy the commitments to the federal government that it would be making if the SPA were accepted. For these and other reasons described below, I encourage you to reject the SPA.

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On November 7, 2017, Maine voters approved a referendum to expand the state's Medicaid program to cover individuals under age 65 with incomes at or below 138% of the federal poverty level. The referendum, however, contained no appropriations or any other method of funding to pay for this expansion (presumably because the proponents concluded that voters would have been less likely to support the referendum if it were accompanied by new taxes or fees). Nor did the referendum provide funding for DHHS to hire the approximately 100 additional employees who would be needed to implement the expansion.

Rather than including a dedicated funding mechanism (or *any* funding mechanism), the referendum instead left the necessary funding decisions to the ordinary legislative process. The Fiscal Impact Statement accompanying the referendum estimated that the Medicaid expansion would require net annual appropriations of approximately \$55 million, and that "*additional implementing legislation will be required* to provide the additional appropriations and allocations." Even those fiscal estimates were too low (despite consistent arguments by Democrats that Medicaid expansion is free or results in savings). An analysis prepared by DHHS in January 2018 found that the state's share of Medicaid funding for the expanded population would require an expenditure of approximately \$452 million between 2018 and 2023 and more than \$100 million



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per year thereafter. Current Department projections indicate that the balance in Maine's Medicaid accounts will not even be sufficient to cover the costs of Medicaid for the State's *existing* population for the remainder of this fiscal year.

Shortly after the referendum was approved, I acknowledged that Medicaid expansion was now the law and asked the Legislature to identify a way to pay for the substantial additional costs the state would incur. I informed the Legislature that whatever method it chose should be fiscally prudent and sustainable in the long run (Maine has an unfortunate history of funding major programs through budget gimmicks or one-time funding that is insufficient to cover long-term costs). I even suggested some funding sources, but the Legislature chose not to accept my suggestions. To date, *no necessary appropriations exist*, and there is no timetable for when such funding might materialize. As a result, I instructed DHHS not to begin implementing the costly expansion until the necessary staff and appropriations are in place. An activist state trial court has nonetheless ordered DHHS to submit the SPA to the federal government, and I have been unable to obtain appellate review on the merits of that decision. That decision ordered the submission of the SPA, but did not order or even suggest a source of funding—a function that even the court did not dispute belongs exclusively to the Legislature.

Although the Maine courts have ordered DHHS to submit the SPA to CMS despite the lack of necessary funding, CMS is under no obligation to approve it. Indeed, doing so would *violate* federal law, as the Chief Justice of the Maine Supreme Judicial Court noted in a recent decision by the Court declining, for now, to consider an appeal from the current order. As the Chief Justice explained, “any plan submitted by [DHHS] will, by definition, have to report candidly that no legislative action or judicial adjudication regarding funding has been completed” and thus “such a plan appears to have no reasonable likelihood of meeting the approval of the administrators of the federal Medicaid program.” *Maine Equal Justice Partners v. Comm’r, Maine Dep’t. Health & Hum. Servs.*, 2018 ME 127, ¶ 17 (Saufley, C.J., concurring); *see also id.* ¶ 14 n.5 (noting that Maine’s “submission cannot, in practical terms, meet the requirements of the federal law at this stage of the trial court’s proceeding” (citing 42 U.S.C. § 1396a(a)(2)). *See also* 42 C.F.R. Part 431.

The court-mandated SPA runs afoul of other federal requirements as well. The failure of the Legislature to provide any funding for additional staff leaves DHHS in serious jeopardy of being unable to meet its obligations to accurately make eligibility and program integrity determinations. *See* 42 C.F.R. § 431.960(d); 42 C.F.R. § 431.1010. Recent audits from the HHS Office of Inspector General indicate this has been a serious issue in states that expanded Medicaid with a legislative commitment of funding.¹ Moreover, because the SPA is being submitted according to the terms of a court order, the Department has been unable to comply with the mandatory notice provisions (including 30-day notice) to Indian tribes. *See* 42 C.F.R. §431.408; Tribal Consultation Policy (Dec. 10, 2015).²


¹*See, e.g.,* *OIG Audit of California* (February 2018) (<https://oig.hhs.gov/oas/reports/region9/91602023.pdf>); *OIG Audit of California* (January 2018) (<https://oig.hhs.gov/oas/reports/region2/21501015.pdf>).

² *See* <https://www.cms.gov/Outreach-and-Education/American-Indian-Alaska-Native/AIAN/Downloads/CMSTribalConsultationPolicy2015.pdf>.

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I thus strongly encourage CMS to reject the SPA. If the SPA is approved, the state will become obligated under federal law to fund the full range of Medicaid services for tens of thousands of additional individuals. Until the necessary funding is in place, however, the federal government can take no assurance that Maine will be able to pay for its share of costs under the program. Under these circumstances, CMS should reject the SPA and avoid putting Maine in a situation where it will be unable to meet its obligations to the federal government. Indeed, prior unfunded expansions left Maine deeply in debt—hospital providers were owed nearly a billion dollars in Medicaid money by the time my administration paid them several years ago. CMS should not accept a SPA in circumstances in which the state has no legislative commitment ensuring that it can comply with its obligations.

Respectfully submitted,

A handwritten signature in blue ink that reads "Paul R. LePage". The signature is written in a cursive style with a large, stylized "P" and "L".

Paul R. LePage
Governor

cc: President Donald J. Trump
Vice President Michael R. Pence